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IN THE

Supreme Court of the United States

October Term, 1955

No. 672

THE BALIAN ICE CREAM CO., INC., a corporation,
Petitioner,

vs.

ARDEN FARMS CO., a corporation, *et al.*,
Respondents.

(And Fourteen Companion Cases).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

All respondents in these fifteen cases join in this single brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Said petition raises the same issues in all fifteen cases. Our reference to the above entitled case will, therefore, be applicable to all the other cases.

Questions Presented.

Petitioner's statement of the questions presented is inaccurate in the light of the findings of the District Court and the decision of the Court of Appeals. The District Court not only found that petitioner had failed to prove a *prima facie* case, but went further and found that re-

spondents' defense of "meeting competition", among others, was established, and the Court of Appeals held such findings were supported by substantial evidence. Consequently, respondents submit the following as their own statement of the questions presented:

1. Is a mere difference in price of ice cream products sold by respondent Arden Farms Co. in two widely separate geographical areas a *prima facie* violation of Section 2(a) of the Clayton Act, where the District Court made the following findings and the Court of Appeals held that such findings were supported by substantial evidence:

(a) That such respondent doing both local business and interstate business in good faith uniformly reduced prices locally by reason of competitive conditions, which reduction was not made for the purpose of destroying competition or eliminating a competitor.

(b) That the prices of such respondent in each area were fair and reasonable and were based upon competitive conditions and variations in costs in said areas and there was no reason for similarity in prices between the two areas.

(c) That the differentials in price of such respondent did not affect competition, tend to monopolize or eliminate any competitor or unlawfully restrain, lessen, stifle, burden or otherwise interfere with interstate commerce.

2. Assuming for the purpose of argument that the circumstances shown by the foregoing question show a *prima facie* violation of Section 2(a) of the Clayton Act,

would the defense of "meeting competition" under Section 2(b) of the Act be established when:

(a) respondent's price reduction was made to all customers throughout the local area in an attempt to meet equally low prices of competitors to certain customers located within said area, and

(b) respondent shows that its ice cream products which were reduced in price in the local area are in competition with like ice cream products sold by its competitors.

Statement of the Case.

Petitioner's statement of the case is incomplete and gives an inadequate impression of the nature of the action and the issues involved. Without pointing out in detail the omissions in petitioner's statement, respondents desire to make their own statement of the case.

Although petitioner in the complaint charges respondents with numerous acts in violation of the Antitrust Laws, the petition here is confined to one act of one respondent, namely, Arden Farms Co.,[1] claimed to be in violation of Section 2(a) of the Clayton Act. The act of respondent Arden relied upon by petitioner was its uniform reduction in the price of certain of its ice cream products on November 21, 1949, to customers in the Los Angeles area.

Petitioner does not challenge any finding of fact. Consequently our statement of the case is based chiefly upon said findings.

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[1]Arden Farms Co., a Delaware corporation.

Respondent Arden manufactures and sells ice cream products at wholesale in a number of western states [Fdg. 5(a); R. Vol. I, 150]. On November 21, 1949, it uniformly reduced the price of certain ice cream products by reason of competitive conditions in the Los Angeles area [Fdg. 16; R. Vol. I, 161-162].

Respondent Arden was engaged in interstate commerce, but only 8/10ths of 1% of all ice cream products manufactured by it was transported across state lines for direct sale to wholesale route delivered customers and not more than 3.08% of its total production was transported across state lines, including said 8/10ths of 1% [Fdg. 43; R. Vol. I, 175, 176].

Prior to said price reduction respondent's prices in the Pacific Northwest states were lower than its prices in the Los Angeles area, but after said price reduction the prices in the Pacific Northwest states were higher than in the Los Angeles area.[2] The price reduction in the Los Angeles area continued until January 1951, when the prices were restored to substantially their previous level [R. 2095; Fdg. 16, R. Vol. I, 161-162; Ex. 12C, R. Vol. II, 495].

The ice cream products sold by respondent Arden in the Los Angeles area were manufactured by it in said area and the ice cream products sold by it in other areas where it did business were manufactured by it and in general were sold in the State where they were manufactured with certain exceptions in the Pacific Northwest states

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[2]Petitioner's Brief in the Ninth Circuit, page 64, where it is stated: "Before the price cut Arden's prices in the Northwest were lower than Arden's prices in the Los Angeles Area" (citing numerous exhibits).

[Fdg. 43; R. Vol. I, 175-176]. In all areas where Arden did business it sold ice cream products in competition with other ice cream manufacturers. Arden's competitors in the Los Angeles area included Carnation, Challenge, Golden State, Swift & Company and many others, as well as petitioners in all fifteen cases [R. Vol. IV, 1609]. It also was in competition in said areas with large chain supermarkets and so-called "captive creameries" [Fdg. 10; R. Vol. I, 158-159].

For several years prior to November, 1949, the business of selling ice cream products in the Los Angeles area had been very competitive [Fdg. 6; R. Vol. I, 154]. Competitors of respondent Arden were offering and giving prices to customers at less than their published price list, giving gratuities, rebates, discounts, free service, free material and equipment as a means of selling their products, and during the said period Arden's competitors, including petitioner and others, offered to sell and sold ice cream at prices as low or lower than the prices established by respondent Arden on November 21, 1949, for like ice cream products in the Los Angeles area [Fdg. 7; R. Vol. I, 155-156].

Arden's sales had been declining for several years prior to 1949 and in the latter year Arden did only 18% of the business in the Los Angeles area [Fdg. 12; R. Vol. I, 159-160], and in 1950 during the price reduction its volume had declined to 17% in the Los Angeles area [Fdg. 12; R. Vol. I, 159] and its profits in 1950 were substantially the same as they were in 1949 and were found to be reasonable [Fdg. 39; R. Vol. I, 173-174].

Petitioner in each of the fifteen cases is an ice cream manufacturer who does business only in the Los Angeles

area [Fdg. 4; R. Vol. I, 150] and is not engaged in interstate commerce. Petitioners' customers do not compete in any area other than the Los Angeles area [Fdg. 44; R. Vol. I, 176].

During 1949 and 1950 the combined gallonage of all petitioners in said fifteen cases in the Los Angeles area remained substantially constant at 13% [Fdg. 13; R. Vol. I, 160]. No petitioner was eliminated as a competitor or forced out of business as a result of the price reduction [R. Vol. I, 132].

The prices established by Arden in the Los Angeles area for certain of its ice cream products on November 21, 1949, were not lower than the prices of a number of its competitors prior to said date for like products [Fdg. 16; R. Vol. I, 161-162]. Arden's price reduction was not unreasonably low and bore a reasonable relation to said respondent's previous prices and the prices of its competitors in the Los Angeles area and were fair and reasonable [Fdg. 29; R. Vol. I, 169-170].

Respondent Arden in reducing its prices was not actuated by any purpose, design or intent to restrain, lessen, stifle or burden interstate commerce in the manufacture, distribution or sale of ice cream products and no part of said trade or commerce was unlawfully restrained, lessened, stifled or burdened [Fdg. 30; R. Vol. I, 170].

Respondent Arden in reducing its prices was not actuated by any purpose, design or intent to prevent or destroy competition or to injure or destroy petitioner or

petitioner's business in the Los Angeles area or in interstate commerce [Fdg. 31; R. Vol. I, 170].

The prices charged by respondent Arden in any state where it did business were based on competitive conditions and its costs in the respective states [Fdg. 33; R. Vol. I, 171-172]. By reason of said competitive conditions and variations in cost existing in the respective states there was no reason for any similarity between the prices at which the respective ice cream products were sold in each of such states [Fdg. 34; R. Vol. I, 172].

Arden reduced its prices in good faith to meet the equally low prices of its competitors and in so doing was justified by reasonable business and economic considerations. [Fdg. 18; R. Vol. I, 163].

Any difference in the prices charged by Arden in different states did not substantially lessen competition or tend to create a monopoly in either state or where any such differential may have existed [Fdg. 45; R. Vol. I, 176-177].

Petitioner states that respondents defended upon three bases (Pet. p. 7, last par.). This is not a fair statement of the numerous defenses relied on nor an accurate statement of those mentioned as is shown by the findings hereinabove mentioned.

ARGUMENT.

I.

There Is No Special or Important Reason for the Granting of the Writ in the Instant Case.

Petitioner has failed to show any special or important reason why this Court should exercise its supervisory jurisdiction and grant the Writ herein. The decision of the Ninth Circuit is clearly in conformity with the decisions of this Court and other Circuits.

In support of its contention that the opinion of the Ninth Circuit is in conflict with the opinions of this Court and of certain Circuits, petitioner quotes certain portions thereof out of context and in some instances from widely separated paragraphs of that opinion, and in others only portions of sentences, without any analysis of the findings upon which that decision is based. Petitioner has also contended that the Ninth Circuit's opinion is in conflict with this Court's decision in *Moore v. Mead,* 348 U. S. 115 and in conflict with the decision in *Porto Rican American Tobacco Co. v. American Tobacco Co.* (2nd Cir.), 30 F. 2d 234, and as hereafter shown, has quoted from each of said opinions isolated portions thereof which completely fail to show the material underlying facts upon which said cases were decided.

Contrary to the contention of petitioner, as we shall demonstrate, the decision of the Ninth Circuit is not in conflict with the *Mead* case, or of the *Porto Rican Tobacco* case (Point II, *post*). There is not a single decision of any court which has held that a price reduction, under the circumstances found in the instant case, violates Section 2(a) of the Clayton Act. Similarly there is not a single decision which has held that mere differentials

in price alone in widely separated geographical areas constitute a price discrimination in violation of Section 2(a) of the Clayton Act as will be shown under Point III hereof.

Petitioner further asserts that the decision of the Ninth Circuit sweeps away essential parts of an important Antitrust Act (Secs. 2(a) and 2(b) of the Clayton Act) (Pet. p. 9). In this connection, petitioner claims that the basic and original purpose of Congress in enacting Section 2 of the original Clayton Act was to outlaw geographical price differentials (Pet. p. 9).

Petitioner's statement is not only an incorrect interpretation of the objects of said Statute, but it is clear from the legislative record which petitioner cites (Pet. p. 10) that Section 2 of the original Clayton Act was aimed at the evil of lowering prices in a particular locality for the *purpose of driving a rival out of business* while normal and higher prices were maintained in the rest of the country.[3] (S. R. 698, 63rd Cong. 2d Sess. 1, 43 (1914); H. R. 627, 63rd Cong. 2d Sess. 8 (1914).) In view of the clear purpose of Congress in enacting the Clayton Act, it is apparent that the decision of the Ninth Circuit is not in conflict with these basic purposes.

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[3]The committee on the judiciary in speaking of the objects of the proposed original Act, at page 8 of H. R. Rep., No. 627, 63rd Cong., 2d Sess. (1914), said:

> "Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread *unfair trade practice* whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, *have heretofore endeavored to destroy competition and render unprofitable* the business of competitors by selling their goods, wares and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country." (Emphasis supplied.)

Petitioner quotes various isolated phrases of the Ninth Circuit's opinion (Pet. p. 10) and then claims that this demonstrates that the Court approved predatory price cutting which the Clayton Act outlawed. Not only does petitioner ignore the basic findings of fact in the instant cause, but the isolated phrases which it quotes are taken out of context and do not remotely suggest what petitioner claims. The context of that part of the Court's opinion referred to clearly shows that the Court was paraphrasing petitioner's own contentions. The Court then goes on to point out that the implication of petitioner's argument is that prices could never be lowered by a concern which does any interstate business in one area if it did not make a corresponding price cut in every other locality where it does business.

That the Ninth Circuit's opinion is not at variance with the basic principles of the Clayton Act appears from the following statement from its opinion which petitioner fails to mention.

> "It is perfectly true that the history of competition in the United States furnishes many instances where consolidated corporations or so-called trusts have dropped prices in order to eliminate the individual competitor, and there is no doubt that one of the legislative purposes in the Clayton Act and the Robinson-Patman Act was to meet such unlawful activity. *But this is not such a case.*" (Emphasis supplied.) [R. 2101.]

The price rigidity for which petitioner here contends is contrary to antitrust principles. This Court in its decision in *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U. S. 61, 63, 73-74, recognized

that price uniformity and rigidity is in open conflict with the purposes of antitrust legislation.[4]

Petitioner has made no showing of any special or important reason sufficient to justify this Court in granting a Writ.

II.

There Is No Conflict Between the Instant Case and Moore v. Mead's Fine Bread Co., 348 U. S. 115 or Porto Rican American Tobacco Co. v. American Tobacco Co. (2d Cir., 1929), 30 F. 2d 234.

As a ground for the granting of the Writ, petitioner claims that the decision of the Ninth Circuit is in direct conflict with the decision of this Court in *Moore v. Mead,* 348 U. S. 115 and *Porto Rican American Tobacco Co.* (2d Cir., 1929), 30 F. 2d 234.

Petitioner seeks to have the instant case decided, not on the particular facts disclosed by the Record, but on its erroneous assertion that the facts here are analogous to those in *Moore v. Mead,* and *Porto Rican American Tobacco Co.* cases.

In *Moore v. Mead* the jury found that Mead's Fine Bread Co. cut its price of bread locally to one-half of its former price, which was below its cost, for the express purpose and design of destroying and eliminating Moore as a competitor who was solely engaged in the manufacture and sale of bread locally. The Mead Company maintained its higher prices in interstate sales. The purpose

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[4]See: *Report of the Attorney Generals National Committee to Study The Anti-Trust Laws* (1955), pp. 131, 132.

and plan was successful, and the Moore Company was forced out of business. In that case this Court stated:

> "The destruction of a competitor was plainly established, as required by the amended §2(a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by §3 of the Robinson-Patman Act, was ample." (348 U. S. 118.)

And further:

> "This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act. See Porto Rican American Tobacco Co. v. American Tobacco Co. (CA 2d NY) 30 F. 2d 234, 237. It seems plain to us that Congress went at least that far in the Robinson-Patman Act. As we have shown, the facts charged and found read upon the words of the statute." (348 U. S. 120.)

And, towards the close of its opinion, said:

> "It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." (348 U. S. 120.)

Petitioner quotes from *Moore v. Mead* (Pet. p. 13). The quotation is incomplete, being isolated phrases or sentences from an integrated paragraph. The first two sentences of the paragraph, which petitioner omits, show that the subject matter of the paragraph relates to "out-

lawed competitive practices" involved in that case. The first two sentences of said paragraph read as follows:

> "We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through *outlawed competitive practices*". (Emphasis supplied.) (348 U. S. 119.)

The instant cause is not a case of the use of price cutting with the purpose and intent of eliminating a competitor or destroying competition, nor is it a case where interstate business was used to destroy local business through the medium of price cutting. It is not a case where the price differentials involved had any relation to or effect upon each other. Finally, it is not a case where the effect of such price differentials either substantially lessened or prevented competition with any person, or tended to monopoly.

It is obvious from an examination of the pertinent and controlling facts in each case that a conflict between the instant case and this Court's decision in the *Moore v. Mead* case simply does not exist.

The *Porto Rican Tobacco Co.* case (2d Cir., 1929), 30 F. 2d 234, cited by petitioner in its petition (p. 14) is likewise inapplicable. In that case the Porto Rican firm had failed to use its influence to oppose a local tax on cigarettes. To retaliate, the American Tobacco Co. lowered its prices in Porto Rico to approximately one-half of its price in the United States and at a heavy

loss to itself and the Porto Rican firms with the express design and plan of driving the Porto Rican firm out of business. This is shown by the language of the opinion of the Court from which we quote:

> "Appellant sent its export manager of its entire business to Porto Rico to wage the price war, and his admissions and business methods, there displayed, all prove the fact that it was intended to punish, and, if possible, eliminate, the appellee as a competitor. He directly proceeded to use strong, unfair competitive methods, and, from his own statements, designedly tried to cause loss to the appellee, a weaker competitor." (30 F. 2d 237.)

In that case all of the American cigarettes were manufactured and shipped into Porto Rico for sale. It further appears from the Court's opinion that the purpose of such discrimination was not in good faith to meet competition, but to effect by such discrimination, a substantial lessening of competition or to create a monopoly.

We submit that petitioner's attempt to parallel the present case with that of this Court's decision in *Moore v. Mead* and the decision in the *Porto Rican Tobacco Co.* case is completely without foundation.

III.

Petitioner's Criticism of the Opinion of the Ninth Circuit Is Clearly Without Merit.

Petitioner asserts that the opinion of the Ninth Circuit is erroneous for the following reasons: (a) the Court refused to recognize the alleged illegality of geographical price discrimination (Pet. p. 11), (b) the Court refused to recognize locally sustained injuries as protected by the Statute (Pet. p. 12) and (c) the Court imposed the false requirement that purchasers from the discriminator must compete with each other (Pet. p. 13).

In the succeeding subparagraphs of this Point III we shall show that each of the above contentions of petitioner is without merit.

A. The Sale of Goods in Widely Separated Geographical Markets at Different Prices in and of Itself Does Not Constitute Discrimination.

Petitioner claims that the Ninth Circuit was in extreme error when it failed to hold that respondent Arden was guilty of price discrimination in violation of Section 2(a) of the Clayton Act (Pet. p. 11). In support of such claim, petitioner has quoted an abstract statement of the Court (Pet. p. 11) without giving any consideration to the basis upon which the statement is predicated or the underlying premise of the Court.

A mere difference in price in widely separated geographical areas under the facts found in this case does not constitute price discrimination within the meaning of Section 2(a) of the Clayton Act. This is clear from the often

quoted definition of "price discrimination" by Congressman Utterback, Manager of the Conference Bill of the Robinson-Patman Act. The Congressman said at 80 Cong. Rec. 9416 (1936):

> "In its meaning as simple English a discrimination is more *than a mere difference.* Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary *costs and profit* as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. *But where no such relationship exists. where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."*[5] (Emphasis supplied.)

Congressman Wright-Patman, the co-author of the Act, is fully in accord with these views. Of a series of questions and opinions set forth in his book, *The Robinson-*

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[5]This Court in the case of *F. T. C. v. Automatic Canteen Co. of America,* 346 U. S. 61, in discussing the phrase "discrimination in price" as used in Sections 2(a) and 2(b) of the Act in Footnote 10 of the opinion referred to the above statement of Congressman Utterback.

Patman Act (1938), pages 58-59, the following is most applicable:

> "QUESTION. Can I sell at different prices to different customers in different cities who are not in competition with each other?
>
> "OPINION. Yes, so long as the sale is not below cost. *There would be no discrimination within the application of the Act, unless a deliberate attempt were made* to destroy, or substantially lessen, competition in some locality, or in primary lines of commerce." (Emphasis supplied.)

Significantly, the unchallenged findings in this cause, are squarely within the criteria laid down for lawful price differentials by both Congressmen Utterback and Patman.

That mere difference in price in different areas is not a price discrimination is shown by a comparison of Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act. In Section 2(a) of the Clayton Act it is made unlawful for any person engaged in commerce and in the course of commerce "to discriminate in price between different purchasers." Section 3 of the Robinson-Patman Act provides it shall be unlawful for any person "to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said persons elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States." When dealing with sales of the same article in disconnected noncompetitive areas, Congress does not use the word "discriminate" but uses the appropriate words, "at prices lower than". Therefore, it is clear that sales at different prices in different areas are not in and of themselves a discrimination and are not illegal under Section 2(a) of the Act.

The theory advanced by petitioner would be in open conflict with basic antitrust policies and erect market barriers to efficient distribution. The opinion of the Ninth Circuit recognizes this when it specifically stated:

> "The implication of the arguments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business. This postulate need not be debated under the facts here. It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing intrastate business." [R. 2096.]

Indeed it is implicit in the foregoing observation of the Ninth Circuit that if petitioner's contention were adopted, an interstate company would be confronted with the dilemma of a nationwide price reduction regardless of competitive conditions, or no price reduction at all. If a nationwide price reduction were established, it might well destroy weaker concerns throughout the nation. The only other alternative would be for the interstate company to cease doing business locally. On the other hand, a strong, local concern could lower prices and force the interstate company out of the local market unless the latter could exist under a nationwide price reduction. If petitioner is correct, the antitrust laws would destroy rather than promote competition.

There is nothing in the Act which makes a price reduction in and of itself illegal. There is not a single case so holding. As stated in *General Shale Products Corporation v. Struck Const. Co.* (W. D. Ky., 1941), 37 F. Supp. 598, 603:

> "There is nothing in the Act which attempts to establish the price at which an article can be sold

to a purchaser; it merely provides that a seller cannot discriminate by selling it to one purchaser for less than he sells it to another purchaser who is in competition. Accordingly, a sale at a reduced price *is not illegal unless it is made for the purpose of discriminating between competitive buyers.*" (Emphasis supplied.)

Cf. Schine Theatres, Inc. v. United States, 334 U. S. 110, 120-121.

Assuredly the decision of the Ninth Circuit recognized and followed the applicable principles of antitrust law.

B. The Ninth Circuit Did Not Hold That Locally Sustained Injuries Were Not Protected by Section 2(a) of the Clayton Act.

Petitioner asserts that the Ninth Circuit held that locally sustained injuries were not protected by Section 2(a) of the Clayton Act. In reliance thereon, petitioner quotes (Pet. p. 12) from small isolated portions of a lengthy paragraph of the opinion which in no way supports its contention, and in which the court does not even discuss the point asserted by petitioner.

The opinion of the Ninth Circuit specifically recognizes that local merchants are protected by the antitrust laws as announced in the case of *Moore v. Meade.* The Ninth Circuit stated:

> "Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly try to cause loss to one weaker competitor." [R. 2098.]

This is also clearly shown from the concluding paragraph of the Ninth Circuit's opinion which we have heretofore quoted under Point I herein.

C. The Ninth Circuit Imposed No Requirements That Purchasers From an Alleged Discriminator Must Compete With Each Other.

Petitioner's additional contention of "extreme" error of the Ninth Circuit's decision is that it imposed a requirement that purchasers from an alleged discriminator must compete with each other before there can be a violation of Section 2(a) of the Clayton Act (Pet. p. 13). Such contention completely distorts the opinion of that Court.

In the first place, as we have previously pointed out, the Court found that there was no price discrimination within the meaning of the Act because of the findings of fact expressly negativing the existence of such price discrimination and affirmatively showing the justification for the price differentials. Then, the Ninth Circuit [R. 2098] in answer to petitioner's contention that *F. T. C. v. Morton Salt,* 334 U. S. 37 applied, distinguished that case on the basis that it involved differentials between competing purchasers of the same seller. Nowhere in the opinion is there a statement, either by inference or otherwise, that in order to establish price discrimination within the meaning of the Act there must be sales at different prices to purchasers who compete directly with each other.

The statements of the Ninth Circuit from which petitioner quotes (Pet. p. 13), are taken out of context; the two statements are from different paragraphs and refer to different subject matters. The first statement [R. 2097] appears in a paragraph relating generally to the Court's findings, the second [R. 2098], some four paragraphs subsequent to the first, in a paragraph distinguishing *F. T. C. v. Morton Salt Co.,* 334 U. S. 37. By no stretch of imagination do the context of these paragraphs

indicate that the Court imposed a requirement that the differentials must be to competing purchasers in order to establish violation of the Clayton Act.

Every essential element in proof of a *prima facie* violation of Section 2(a) of the Clayton Act is absent in this case. Indeed, the findings establish there were no price discrminations and none of the statutory requisites of injury to competition.

IV.

The Court of Appeals Did Not Base Its Decision in Part Upon a Nonexistent Finding.

The third ground urged by petitioner why the writ should be granted is, that the Ninth Circuit "based its decision in part upon a nonexistent finding as to the likelihood of competitive injury" (Pet. p. 15). Petitioner states that the Ninth Circuit asserts that the District Court found "there was no possibility that competition might have been lessened," and petitioner then states that the District Court made no such finding.

A reading of the whole paragraph of the opinion containing the language quoted by petitioner shows such contention is erroneous.[6] The Ninth Circuit used the word "findings," plural, not the word "finding," singular, indicating that it was referring to all of the findings of the District Court when it stated that the findings expressly

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[6]The paragraph of the opinion referred to reads as follows:

"The difference in price between various states did not substantially lessen competition or tend to create a monopoly in ice cream products. There was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case. The findings of the trial court expressly negativing the existence of any such consequences or a possibility of such results were supported by substantial evidence." [R. 2099.]

negative the possibility that the price differentials "substantially lessened competition or tended to create a monopoly in ice cream products." And, without question, all the findings considered as a whole so indicate.

It is undisputed that the price reduction complained of terminated on January 13, 1951, prior to the trial of this action [R. 2095]. Consequently, the District Court was in a position to determine with finality whether the price differentials did or did not at any time during the price reduction substantially lessen competition or tend to create a monopoly, and it found in the negative [Fdg. 45; R. Vol. I, 177].

Petitioner relies on the following three Federal Trade Commission cases as showing the necessity for a finding of "reasonable possibility":

Corn Products Ref. Co. v. F. T. C., 324 U. S. 726;

F. T. C. v. Morton Salt Co., 334 U. S. 37;

Exposition Photograph Products, Inc. v. F. T. C., 217 F. 2d 821.

In all of said cases the practices claimed to violate the Clayton Act were being followed at the time of the order of the Federal Trade Commission and every indication was that such practices would continue to be followed in the future. The continuance of such practices made necessary a determination as to whether or not *in the future* there was a reasonable possibility that such practices would substantially lessen competition, since Section 2(a) of the Clayton Act uses the words "where the effect of such discrimination *may be* substantially to lessen competition." As the court said in the *Morton Salt* case, "such findings are to form the basis for cease and desist orders" (334 U. S. 54).

V.

Respondents' Defense of Meeting Competition Was Proven Although the Price Reduction Was General Throughout the Local Area.

The fourth ground urged by the petitioner why the writ should be granted is, that the defense of respondents of "meeting competition" was not proven since respondent Arden by reducing prices in the whole Los Angeles area, did not meet individual prices of competitors (Pet. pp. 17-18).

This defense was only one of a number of defenses urged by respondents and found to be established by the District Court. Therefore, if any burden rested on respondents to meet a *prima facie* case (assuming that one was shown) respondents completely met that burden as disclosed by the findings and the decision of the Ninth Circuit.

There is nothing in Section 2(b) of the Clayton Act which provides that the defense of meeting competition is only proven if prices are reduced to meet an individual, equally low price, and petitioner has cited no case so holding. To deprive respondent Arden of the right to reduce prices to all customers in a local area would be depriving it of the essence of competition. Respondent Arden's general price reduction of certain of its ice cream products in the Los Angeles area was necessary in order to eliminate a great many abuses found by the Court to exist in said area [Fdg. 7; R. Vol. I, 155-156]. The Ninth Circuit stated that this was "one of the necessities of competition" [R. 2096].

Petitioner has shown no reason why respondent Arden in establishing its defense of "meeting competition" could

not give the benefit of the price reduction to all customers within the Los Angeles area rather than to a number only who had been quoted equally low prices by Arden's competitors, including petitioner.

VI.

Respondents' Defense of Meeting Competition Was Proved by Proper Evidence.

The fifth ground urged by petitioner why the writ should be granted is, that the defense of "meeting competition" was not proved since respondents (a) undercut the lower prices of competitors, (b) did not show the quality of the products of competitors, nor (c) show the quantity of sales by competitors (Pet. pp. 20-23).

In support of its first contention petitioner refers to a statement in the opinion of the Ninth Circuit that Arden would not have violated the statute even if it had placed the price lower than any competitor (Pet. p. 21). A reading of the opinion indicates that the court's statement relied on by petitioner had reference to whether or not petitioner had made out a *prima facie* case and was not directed to the respondents' defense of "meeting competition" which appears in the latter part of the opinion [R. 2099-2100]. In any event, it is to be noted that the Ninth Circuit did not say the respondent Arden had placed the price lower than any competitor's price. In fact the District Court found that respondent Arden did not undercut the lower prices of competitors.[7] Said find-

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[7]The prices established by Arden in the Los Angeles area and in other areas of the State of California on said date (November 21, 1949) were not lower than prices at wholesale of its competitors on or before November 19, 1949, for ice cream products of like grade, quality and quantity in the Los Angeles area and other areas in the State of California [Fdg. 16; R. Vol. I, 162].

ing is not challenged by petitioner and, consequently, is a complete answer to petitioner's first contention. There is obviously no conflict between the decision of this court in the case of *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, and the decision of the Ninth Circuit in the case at bar as claimed by petitioner (Pet. pp. 20-21) in view of the difference in the findings in each case.

Petitioner's second contention is, that the defense of "meeting competition" was not proved by reason of the fact that respondents failed to introduce evidence of the quality of the product of the competitor (Pet. p. 21). Petitioner quotes from the opinion of the Ninth Circuit to the effect that the finding of the District Court that Arden had actually acted in good faith to meet the low prices of some of its competitors was not destroyed because it failed to introduce evidence of the quality of the product of the competitor [R. 2095]. The Ninth Circuit, in the portion of the opinion referred to, was referring to the case made by the petitioner and not to respondents' defense of "meeting competition."

There is no question but what the products of respondent Arden involved in the price reduction and the products of its competitors which it is claimed to have met were closely related and in competition with each other.

The District Court found that the reduced prices of respondent was not lower than prices of its competitors for ice cream products of *like quality* [Fdg. 16; R. Vol. I, 162]. Petitioner does not challenge this finding.

In view of the unchallenged findings in this case as above stated, there is no conflict between the decision of the Ninth Circuit in the case at bar and the decision in *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, or *Porto*

Rican Tobacco Co. v. American Tobacco Co., 30 F. 2d 234, as claimed by petitioner.

Petitioner's third contention is, that the defense of "meeting competition" was not proved because respondent Arden allegedly did not show that its equally low price was for the same quantity of goods as offered by competitors at the same price (Pet. pp. 20-23). Petitioner again refers to the statement of the Ninth Circuit to the effect that the finding of the trial court that Arden had actually acted in good faith to meet the equally low price of its competitors was not destroyed because it failed to introduce evidence of the quantity of the sales of the competitor (Pet. p. 23). Clearly, the Ninth Circuit was here referring to the case made by the petitioner rather than the defense of "meeting competition." The District Court found that the prices established by respondent Arden were not lower than the prices of its competitors for ice cream products of like grade, quality and quantity in the Los Angeles area and other areas in the State of California [Fdg. 16; R. Vol. I, 161-162]. This finding is not challenged by petitioner. Petitioner's contention is without merit.

Conclusion.

We submit that petitioner has failed to state any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the petition should be denied.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
LEONARD A. DIETHER,
Attorneys for Respondents.

HENRY F. PRINCE,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1955
No. 672

THE BALIAN ICE CREAM CO., INC., a corporation; F. AND A. ICE CREAM CO., a corporation; COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners in these fifteen cases of geographical price discrimination under the antitrust laws pray that this Court grant rehearing of its order of March 26, 1956, denying the petition for writ of certiorari, that said order be vacated, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit as prayed for in the petition filed February 8, 1956, herein.

Preliminary Statement.

Novel and compelling grounds for review, not previously presented herein, are presented in this petition. Section 2 of the amended Clayton Act is in jeopardy.

This is an aggravated and extreme case of geographical price discrimination. This is true because the re-

spondents in the Los Angeles area imposed much lower prices than elsewhere, yet their cost base in Los Angeles admittedly was much higher than elsewhere. [R. 706-707, 1443, 1459, 1462.] This is uncontradicted. Thus, on the basis of costs, respondents should have maintained higher—not lower—prices in Los Angeles than in other areas. Indeed, respondents have never made any attempt to justify their local price discrimination on the ground of lower costs. Nevertheless, an incorrect impression to the contrary may have been left with this Court. (Resp. Br. p. 7.) Actually, the only separate defense raised was a claim of good faith meeting of a competitor's equally low price.

This is not a case where the findings preclude recovery under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[a].) Correct application of statutory law compels reversal, whether or not any finding is accepted or rejected. Only questions of law are presented for decision. These are the novel and compelling questions which follow—which will plague the courts for years to come, unless, at this opportunity, the Ninth Circuit's rulings in direct contravention of federal statute are overturned by this Court.

Reasons for Granting Rehearing and Issuing the Writ.

1. The Court of Appeals for the Ninth Circuit has written into the statute the new element of purpose to destroy competition. This is directly contrary to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[a].)

The requirement of purpose is nowhere to be found in the Clayton Act. More important, it was deliberately eliminated from the original House bill in 1914. The Senate *struck out* the following words so pertinent here:

> ". . . with the purpose . . . thereby to destroy or wrongfully injure the business of a competitor." (Sen. Doc. No. 584, 63d Cong. 2d Sess. [1914] 4.)

Thus the element of purpose was forever stricken out of Section 2 of the Clayton Act and its amended, Robinson-Patman, form.

How, then, is it possible for the Court of Appeals to hold to the contrary as it does in the concluding paragraph of its opinion? In this key paragraph the Ninth Circuit reveals the basic and underlying thesis of its decision. The Court of Appeals states:

> "It is perfectly true that the history of competition in the United States furnishes many instances where consolidated corporations or so-called trusts have dropped prices *in order to eliminate the individual competitor,* and there is no doubt that one of the legislative purposes in the Clayton Act and the Robinson-Patman Act was to meet such unlawful activity. But this is not such a case." [R. 2101, Appx. A, p. 24; italics added.]

The Ninth Circuit thus holds two elements necessary for violation of the statute. The respondents admit that they "dropped prices," and thus one of the two requirements named is present. The fundamental basis of the decision is, therefore, the absence of the other named requirement, *i. e.,* purpose to eliminate a competitor.

Manifestly, the Ninth Circuit is saying that there is no violation of the statute unless it is shown that the discriminator imposed the price cut *"in order to eliminate the individual competitor . . ."* The words "in order to" can only mean "for the purpose of." (*Webster's New International Dictionary,* 2d ed., unabridged, p. 1716.) Thus the Court of Appeals has firmly said that there is

a requirement of purpose to eliminate a competitor. That Court has ruled that purpose is a significant element under Section 2(a) of the amended Clayton Act.

Respondents themselves have emphasized, in argument directed to this very Court, that "the *purpose* of driving a rival out of business" is an important requirement of the statute, and they refer specifically to the above quoted concluding paragraph of the Ninth Circuit's opinion. (Resp. Br. pp. 9-10; italics added.) It is obvious from this time forward that the same argument will be advanced in all courts. All price discriminators will point to the Ninth Circuit's decision as strong authority for this specious proposition. In the vast Ninth Circuit at the very least, in the absence of a Supreme Court decision, there is no longer any such thing as price discrimination unless it is proved that the discriminator was motivated by the purpose to eliminate a competitor, or as the respondents in the case at bar put it, by "the purpose of driving a rival out of business."

The statute itself supplies the answer. The pertinent parts of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, are:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . ." (49 Stat. 1526, 15 U. S. C. §13[a].)

There is no requirement of purpose here or any other place in the Act. But now, forty-two years after the passage of the Clayton Act, the Ninth Circuit suddenly rules that purpose to eliminate a competitor is an essential element. It has erected a phantom statute within which all business men seeking the protection of Section

2 of the amended Clayton Act must bring their cases or fail. The reading into the statute of this foreign requirement is the clearest kind of judicial legislation.

Every day throughout the nation business transactions take place which are affected by the Ninth Circuit's decision. Yet it is utterly impossible at this writing to advise the owner of any business, large or small, what the law really is. On the one hand stands the plain language of the statute, and on the other stands the contrary decision of the Court of Appeals which will probably control the action taken in most courts. By the same token, the Federal Trade Commission can scarcely be expected to proceed under this statute when it is suddenly told by the Ninth Circuit that purpose has now become an essential element of proof.

It is indeed urgent that this Court accept review of this antitrust case in order to preserve the vitality of this important statute which has been saddled with a foreign element bound to destroy the effectiveness of the Act passed by Congress.

Unless the decision of the Ninth Circuit is corrected now, years of litigation in the various circuits will be required before the statute finally is declared to stand without the element of purpose. Until the statute is restored as enacted by Congress, there can only be wasteful confusion on a nationwide scale.

2. The Ninth Circuit has expanded the so-called "good faith" defense to sanction the meeting of unlawful prices of others. Beyond that, the Court of Appeals has made the further ruling that discriminators, under the guise of meeting competition, may adopt such unlawful prices and then extend them to cover an entire geographical area. Thus the decision of the Court of Appeals is directly contrary to Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[b].)

This incongruous ruling is squarely in conflict with the uniform decisions of this Court. In *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 754, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 (1945), this Court specifically stated:

> ". . . the clear Congressional purpose [was] *not* to sanction by §2(b) the *excuse* that a person charged with violation of the law was merely adopting a similarly *unlawful* practice of another." (Italics added.)

The uncontradicted record establishes that respondent Arden definitely knew that the few price deviations it was claiming to meet were themselves unlawful prices. [R. 1562; Ex. AQ.] It is doubly plain that Congress did not intend Section 2(b) of the Act to be available as a defense under such circumstances. Without question the "good faith" defense is not available when the discriminator admittedly recognizes the illegality of the prices it claims to be meeting. It is axiomatic that a discriminator can never claim to be meeting "in good faith . . . an equally low price of a competitor" where it recognizes the unlawfulness of such prices. (49 Stat. 1526, 15 U. S. C. §13[b].)

Nevertheless, the opinion of the Court of Appeals throws out any requirement of lawfulness and permits resort to the "good faith" defense even with knowledge of illegality on the part of the discriminator. In major contradiction of the statute, the Ninth Circuit states:

> "It was not incumbent upon Arden to establish . . . the lawfulness of the prices which it claimed to meet." [R, 2095, Appx. A, p. 17.]

Contrariwise, in *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), this Court emphasized the importance of a showing of the lawfulness of all prices which discriminators claim to be meeting under the "good faith" defense. In that decision this

Court clearly said that a discriminator cannot claim protection under Section 2(b) of the amended Clayton Act unless the competitor's lower price "is a *lawful individual* price." (340 U. S. at 244, 95 L. Ed. at 248; italics added.) And this Court further stated that the statute recognizes meeting only "a *lawful* and equally low price of a competitor." (340 U. S. at 246, 95 L. Ed. at 249; italics added.)

The sharp and direct conflict between the Ninth Circuit and the leading decisions of this Court is self-evident. But the decision of the Ninth Circuit goes much farther even than such head-on conflict.

For the first time the Court of Appeals condones the spreading of an unlawful price pattern over an entire community. This greatly magnifies the discrimination which is unlawful even in *individual* instances. In *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 754, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 (1945), this Court held that the discriminator could not resort to the "good faith" defense since it had "adopted a similarly unlawful practice of another." But, despite this clear statutory law, the Ninth Circuit sanctions the submerging of an entire area under such unlawful prices upon claim of the "good faith" defense. As a matter of law, this is not "good faith" by any standard, especially by the statutory standard established by Congress. Blanketing a whole geographical area with a drastic price cut—with unlawful prices—is a most flagrant and inexcusable discrimination under the Clayton Act. This is the precise retaliatory discrimination which the Ninth Circuit holds exempt from the statute.

There are both federal and state laws to take care of any individual prices of competitors which are illegally low. If any seller, such as respondent Arden, is really concerned about these matters, direct action against unlawful prices may be taken under these laws. And

it is basic to antitrust law that no seller has any right to take matters into its own hands, make an area-wide price cut, and then attempt to seek refuge in the "good faith" defense under Section 2(b) of the Clayton Act. (*F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945); *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951); *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).)

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 214, 71 S. Ct. 259, 95 L. Ed. 219, 224 (1951), this Court states the controlling principle in these words:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured."

Under the Ninth Circuit's opinion the "good faith" defense is now stretched to the point where a discriminator may legally cover any geographical area with prices heretofore held by this Court to be unlawful and hence not protected by the "good faith" defense.

Now, according to the Ninth Circuit, a discriminator may imitate any unlawful, individual, lower price it finds in a community. On the basis of such unlawful lower price, any discriminator is now free to subject an entire area to a drastic price cut in direct violation of the statute specifically enacted to prevent such abuses. This fundamental national policy against local price discrimination is established by the Clayton Act. That policy is safeguarded only so long as use of the "good faith" defense

cannot go beyond the "lawful individual price." (*Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951).)

By its action the Ninth Circuit has scuttled sound policy carefully embodied in statutory law. A general license has been issued for price discrimination, for this dangerous decision expands the "good faith" defense to the point where it protects price discrimination in general.

If the Court of Appeals' opinion stands as law, eventually it will be recognized that Section 2 of the amended Clayton Act has, in the vast majority of cases, been erased from the books.

Summary and Conclusion.

If the decision of the Court of Appeals is allowed to stand without review, it will introduce into Section 2 of the amended Clayton Act the following elements directly contrary to the statute and the decisions of this Court:

(a) The requirement of purpose. This false requirement, nowhere to be found in the statute, will have been written into the Act. It will be necessary for the injured party to show that the discriminator was motivated by the purpose to eliminate a competitor, or as respondents put it, by "the purpose of driving a rival out of business."

(b) License to meet unlawful prices of others. On the basis of a few unlawful prices of others, the discriminator can always obtain complete immunity for its otherwise illegal price discrimination upon assertion of the "good faith" defense. This is directly contrary to *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), and *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945).

(c) The requirement of direct causal connection between the discriminator's prices in different geographical areas and the injury sustained. This false requirement, nowhere to be found in the statute, that injury sustained locally from the impact of area price cutting is not subject to relief, will have been written into the Act. This is directly contrary to *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

(d) The requirement of competing purchasers in a geographical price discrimination case. This false requirement, nowhere to be found in the statute, that purchasers at the point of the price cut have to be in competition with purchasers in other states or areas, will have been written into the Act. This is directly contrary to *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

(e) License to cover an entire area with a discriminatory price cut. Upon the basis of an insignificant number of lower prices of others, an interstate discriminator is given license to single out a local area and to impose a price cut over that entire area. This destroys the statutory rule that a seller may claim to meet competition only in individual instances as they arise—instance by instance. This is directly contrary to *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945).

(f) License to undercut. The discriminator is given license to undercut other sellers and still claim as a defense that it met an "equally low price of a competitor." This destroys the clear law against undercutting. This is directly contrary to *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951).

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

April 18, 1956.

Respectfully submitted,

GORDON F. HAMPTON,
Counsel for Petitioners.

JAMES C. SHEPPARD and
RICHARD B. HOEGH,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

GORDON F. HAMPTON,
Counsel for Petitioners.

FILED
FEB 8 1956
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 672

THE BALIAN ICE CREAM CO., INC., a corporation, F & A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, et al.,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Dee C. Blythe and Lynell G. Skarda move this Court for leave to file a brief in this case as amicus curiae in support of the petition for writ of certiorari. The consent of the attorneys for the petitioners herein has been obtained, but the attorneys for the respondents herein refused to consent to the filing of a brief by movants as amicus curiae.

The movants, Dee C. Blythe and Lynell G. Skarda, have no financial interest in this case, but they were counsel for petitioner in Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed 123 (Adv.), and now have pending in the District Court of the United States for the Western District of Texas, Pecos Division, Cause No. 2182, styled R. B. Baker, Plaintiff, v. Gulf Oil Corporation, a corporation, Humble Oil & Refining Company, a corporation, Standard Oil Company of Texas, a corporation, Magnolia Petroleum Company, a corporation, Sinclair Refining Company, a corporation, Shell Oil Company, a corporation, Phillips Petroleum Company, a corporaton, Continental Oil Company, a corporation, The Texas Company, a corporation, and the Cosden Petroleum Corporation, a corporation, defendants, in which most of the points involved are the same as those presented for decision in the instant case, that is:

(1) Price differentials by a corporation or combination engaged in interstate commerce are per se illegal as a price discrimination under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and neither time, custom, practice, nor the trial court's idea of fairness can be substituted for proof by the discriminator of actual and factual justification in good faith.

(2) Neither an actual burden on interstate commerce, nor a causal connection between prices in different states, nor a purpose or intent to monopolize, nor an actual destruction or elimination of a competitor is necessary to show a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, for Congress under

its plenary powers over interstate commerce already has determined that mere injury to a local competitor encourages and fosters monopoly, and, thus, should be prohibited.

(3) A corporation or combination engaged in interstate commerce cannot use a blanket price cut which is prohibited by and not justified under the Robinson-Patman Act to police or punish its competitors or to hold, gain, or regain what it considers its fair share of the market.

(4) Even if it be assumed that a corporation or combination engaged in interstate commerce can lawfully discriminate in meeting the individual equally low price of either a local or an interstate competitor, the discriminator cannot do so by using a geographical blanket price cut, and in any event it has the burden of showing that the price met was lawful and on products of equal grade, quality, and quantity.

The brief of the petitioners herein in the Court of Appeals for the Ninth Circuit argues only a portion of the aforementioned points, and the discussion therein of those argued is inadequate in view of the intervening decision of this Court in Moore v. Mead's Fine Bread Co., supra, which reversed the opinion of the Court of Appeals for the Tenth Circuit, 208 F. 2d 777, which opinion and all of its concomitant errors were adopted by the Ninth Circuit in the instant case. And further for the reason that movants by reason of their familiarity with the facts in Moore v. Mead's Fine Bread Co., supra, can more adequately treat the legal principles of that case in their application to the instant case. And still further for the reason

that the opinion of the Ninth Circuit in the instant case emasculates and renders ineffective the important decision of this Court in Moore v. Mead's Fine Bread Co., supra, in which movants believe they best can and should defend. And finally for the reason that pending litigation in Baker v. Gulf Oil Corporation, et al., supra, in which movants are counsel for plaintiff, raises some of the identical points, and the erroneous decision of the Ninth Circuit in the instant case endangers a proper trial and decision of that cause which has a fact situation that has already become a subject of concern and intensive investigation by the Congress. See Gasoline Price War in New Jersey, Hearings before a Subcommittee of the Select Committee on Small Business, Part 2, 10/19-20/55, United States Senate, 84th Congress, 1st Sess., 1955; Petroleum Marketing Practices, Hearings before the Select Committee on Small Business, Seattle, Wash., 11/16-17/53, United States Senate, 83rd Congress, 1st Sess., 1953. Movants have no reason to believe that the arguments on the above questions will be expanded properly and be made complete in this Court. If these questions are approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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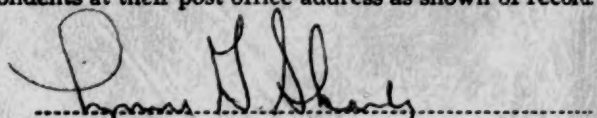
Attorneys for Petitioner.

CERTIFICATE OF SERVICE

I, Lynell G. Skarda, do hereby certify that a copy of the foregoing Motion was mailed on January 27th, 1956, by depositing the same in a United States Post Office with air mail postage prepaid, addressed to counsel of record for petitioners and respondents at their post office address as shown of record.



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FEB 13 1956
HAROLD B. WILLEY, C

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Respondents.

Respondents' Objections to Motion for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. .....

THE BALIAN ICE CREAM CO., INC., a corporation, F. AND A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Respondents' Objections to Motion for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondents object to Movant's motion for leave to file *amicus curiae* brief in the above-entitled matter and refuse to consent to the filing of such a brief for the reasons hereinafter set forth.

1. **Movants' Contention That Moore v. Mead's Fine Bread Company, 348 U. S. 115, Applies Here Is Wholly Erroneous as That Case Is Factually Dissimilar From the Instant Cause.**

All of the basic facts involved in the instant case together with the pertinent findings of fact of the trial court below are set forth in the extensive opinion of the United States Court of Appeals for the Ninth Circuit not

yet officially reported but found in the Record at pages 2080-2101 inclusive. Every material and ultimate fact was decided and found by the trial court in favor of defendants. On appeal, the United States Court of Appeals for the Ninth Circuit found the Court's findings were amply supported by the evidence and that the findings supported the judgment in each cause and affirmed the judgment of the court below. This case, therefore, "must be governed by the well-settled rule in this Court that, when two courts have reached the same conclusion on a question of fact, their findings will not be disturbed unless it is clear that their conclusion was erroneous."

Baker v. Schofield, 243 U. S. 114, 118;

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U. S. 271, 275.

Cf. Fed. R. Civ. P. 52(a).

Manifestly the instant cause is factually dissimilar from *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, which involved the use of price-cutting as a monopoly weapon to eliminate a competitor. In that case the defendant had engaged in predatory price-cutting activities with the intent, purpose and result of driving plaintiff out of business. After a re-trial, judgment was entered by the District Court awarding treble damages in favor of the plaintiff after a jury trial. The United States Court of Appeals for the Tenth Circuit reversed. This court, in upholding the District Court's award of damages to the plaintiff, held that the use of price-cutting activities of a monopolistic weapon with the intent, purpose and result of eliminating competitors violated the Clayton Act and the Robinson-Patman Act. This Court

in that case merely reiterated the established principle of law which bars the use of interstate business to destroy local business through the medium of price-cutting activities done for that purpose.

However, the foregoing principle is not applicable here as the uncontroverted findings of the Trial Court amongst others in this cause are: That the price reduction of Respondents was not made for the purpose of destroying competition or eliminating any competitor [Fdg. 31, Record Vol. I, 170]; that the prices of Respondents in the Los Angeles area and in other competitive areas were fair and reasonable and determined by competitive conditions in the respective areas and that there was no substantial lessening of competition or prevention of competition with any of the persons referred to in Section 2(a) of the Clayton Act [Fdgs. 29, 33, 45; Record Vol. I, 169, 171, 176]; that by reason of competitive conditions and variations in cost existing in the respective states in which Respondent Arden did business, there was no reason for any similarity between the prices at which its respective ice cream products were sold in each of the said states [Fdg. 34; Record Vol. I, 172]; and that the prices established by each Respondent and the sales of ice cream products at such prices were made in good faith to meet the lawful and equally low prices of its competitors [Fdg. 18; Record Vol. I, 163]. Moreover, in the instant cause each of the plaintiffs continued in business except plaintiff Bressler who sold its business to a third party for reasons not concerned here [Record Vol. III, 953] and their combined volume remained constant during the period involved [Fdg. 13; Record Vol. I, 160].

In view of the clear findings of the District Court concurred in by the Court of Appeals, it is evident that *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, has no application whatsoever.

2. The Record in This Cause Demonstrates That All the Basic Issues Were Adequately Presented by the Parties and Movants Have Shown No Reason for Asserting Otherwise.

Movants further argue that they can more adequately present to this Court the principles of law involved in the instant cause notwithstanding their obvious and demonstrated unfamiliarity with the Record and facts and further notwithstanding that the same attorneys who tried the case before Judge Yankwich, filed, briefed and argued the appeal and petition for rehearing before the United States Court of Appeals for the Ninth Circuit. In this connection, Movants purport to list four abstract points of law which they claim were inadequately argued before the Ninth Circuit. These purported points of law are in fact not questions but statements of what Movants think the law ought to be. The first three are not relevant to the disposition of the case in view of the findings of the District Court and the fourth is contradictory to the findings of that court. Moreover, Movants have failed to set forth the relevancy of such proposed points of law to the disposition of the case as required by Subdivision 3 of Rule 42 of this court.

In any event, substantially all of these alleged points of law were in substance exhaustively argued in petitioner's opening brief on appeal and their brief in support of their petition for rehearing before the Ninth

Circuit. In particular, the case of *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, was mentioned innumerable times in the petition for rehearing before that Court and any inference in Movants' motion that the Ninth Circuit did not consider this Court's decision in *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, is completely erroneous. We submit that Movants' argument in the face of the record in this cause is wholly without merit.

3. The Contention That the Decision of the U. S. Court of Appeals for the Ninth Circuit Endangers a Proper Trial and Decision of the Case of Baker v. Gulf Oil Co., Is Without Merit.

Movants contend that the decision of the United States Court of Appeals for the Ninth Circuit endangers a proper trial and decision in the case of *Baker v. Gulf Oil Company,* now pending in the United States District Court for the Western District of Texas, Pecos Division, Cause No. 2182, in which they are counsel, as that case allegedly raises some of the identical points presented in the Ninth Circuit's decision herein. Such contention is merely the conclusion of Movants and there is no showing as to the basis upon which it is made. Even if true, under the Rules of this Court, it is not a proper ground for applying for leave to file an *amicus curiae* brief (Rule 42(3)).

Moreover, an examination of the complaint in *Baker v. Gulf Oil Co., supra,* reveals that not only are the issues of law unlike the instant case, but even if the allegations of the complaint are proved, there is no factual similarity between that case and the instant case.

Conclusion.

To require this Court to consider, in addition to the petition for writ of certiorari, an *amicus curiae* brief duplicating in substance the same principles and arguments would be unduly burdensome to the Court and counsel in this case.

For each and all of the foregoing reasons, we respectfully urge that the motion of Movants for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari in the above-entitled action be denied.

Respectfully submitted,

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